(3) (3)

Nos. 86-71 & 86-97

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

CTS CORPORATION,
Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,
Appellee.

STATE OF INDIANA,
Intervenor-Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF APPELLEE DYNAMICS CORPORATION OF AMERICA TO AFFIRM

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QUESTION PRESENTED

Whether the unanimous decision of the Seventh Circuit Court of Appeals forbidding appellant CTS Corporation ("CTS") from applying the Control Share Chapter of the Indiana Business Corporation Law to the tender offer of appellee Dynamics Corporation of America ("DCA") should be summarily affirmed when:

1. The Chapter allows the management of Indiana corporations to delay tender offers for three weeks beyond the period mandated by the Williams Act and it was impossible for DCA's tender offer to comply with the Chapter even though it satisfied all federal requirements;

2. The Chapter insulates Indiana corporations from the interstate market for corporate control, directly regulates transactions between nonresidents and its burden on interstate commerce far outweighs any local benefits; and

3. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), is dispositive of this case and has provided clear guidance to lower courts considering similar anti-takeover statutes.

PARTIES TO PROCEEDINGS BELOW

In the Seventh Circuit No. 86-1601, which involved the constitutional questions presented by this appeal, the parties in the Seventh Circuit were: DCA, as plaintiff-appellee; CTS, Robert Hostetler, Gary Erekson and Joseph DiGirolamo (officers and/or directors of CTS) as defendants-appellants; and the State of Indiana ("Indiana") as intervenor-appellant.

Seventh Circuit No. 86-1608 involved the same action in the District Court, was consolidated with No. 86-1601, but did not involve the constitutional questions presented by the present appeal. The parties were: DCA, Andrew Lozyniak, Edward J. Mooney, Henry V. Kensing, Patrick J. Dorme, Frank A. Gunter, Curtis T. Roff, Saul Sperber, Joseph P. Walker and Harold Cohan (officers and/or directors of DCA) as plaintiffs-appellees; and CTS, Robert D. Hostetler, Gary B. Erekson, Joseph DiGirolamo, George F. Sommer, Gerald H. Frieling, Jr., Don J. Kacek, Ted Ross and Richard M. Ringoen (officers and/or directors of CTS) as defendants-appellants.

Rule 28.1 Listing. Appellee DCA has no parent corporation, non-wholly owned subsidiaries, or affiliates.

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CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

This case involves the following constitutional provisions and statutes:

1. The Supremacy Clause, U.S. Const. art. VI, cl. 2.

2. The Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

3. The Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(c), 78n(d)-(f).

4. The Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code Ann. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986).

PRELIMINARY STATEMENT

I. CTS OPTED INTO THE CONTROL SHARE CHAPTER TO DEFEAT DCA'S TENDER OFFER AND PROXY CAMPAIGN

This appeal arises out of an all-out effort by the current management and directors (collectively "management") of appellant CTS Corporation ("CTS") to preserve their control over CTS in the face of a challenge to their hegemony by appellee Dynamics Corporation of America ("DCA"). At issue is the preservation of the interstate market for corporate control from a protectionist piece of state legislation that conflicts directly with the timing requirements and investor protection purpose of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). In striking down CTS' application of the Control Share Acquisitions Chapter of the Indiana Business Corporation Law, Ind. Code § 23-1-42-1 *et seq.* ("Control Share Chapter" or "Chapter") to DCA's tender offer, the Seventh Circuit consistently applied this Court's precedents. Its decision should be summarily affirmed, because *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) is dispositive and the unique circumstances of this case make it an inappropriate vehicle for plenary review.

On March 10, 1986, DCA, then CTS' largest shareholder, commenced a tender offer for 1,000,000 additional shares of CTS stock. The offer was designed to expire on April 10, 1986, twenty business days later. DCA also announced a proxy solicitation campaign to elect its slate of nominees to the CTS Board of Directors at the April 25, 1986 Annual Meeting ("Annual Meeting"). Voting the 1,000,000 shares it would acquire in its tender offer was a key part of DCA's election strategy.

CTS vigorously attempted to block DCA's tender offer and proxy solicitation from the date they were announced.[1] CTS has not denied that it rushed to adopt the Control Share Chapter on

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[1] Among other things CTS (1) invoked the Indiana Business Take-over Offers Act, Ind. Code § 23-2-3.1 *et seq.*, by requesting a

(Footnote continued on following page)

March 27, 1986 for that purpose.[2] On March 31, 1986, CTS announced its adoption of the Chapter and stated that it intended to use the Chapter to strip the voting rights from the shares DCA acquired through its tender offer. (App. 85) CTS also stated in filings with the District Court that it would not hold a special shareholders meeting on the voting rights issue before the Annual Meeting, thus making it futile for DCA to attempt to satisfy the requirements of the Chapter. (App. 84)

As intended, CTS' actions directly and adversely affected DCA's tender offer and proxy campaign. On the one hand, DCA's tender offer made no economic sense if DCA could not vote at the Annual Meeting the tendered shares—for which DCA had offered a substantial premium—in favor of its slate of directors. On the other hand, CTS' hasty adoption of the

(Footnote continued from preceding page)

hearing before the Indiana Securities Commissioner and filing an action in Indiana state court seeking to halt DCA's tender offer; (2) filed numerous counterclaims seeking to enjoin DCA's tender offer and proxy solicitation on the grounds that, *inter alia,* DCA's disclosures were misleading and seating DCA's nominees on the CTS Board would violate Section 8 of the Clayton Act, 15 U.S.C. § 19; (3) adopted in succession two "poison pill" shareholder rights plans designed to thwart DCA's tender offer and proxy solicitation; and (4) issued false and misleading communications in connection with its adoption of the second poison pill. The District Court, Seventh Circuit and Indiana Securities Commissioner have rejected all of CTS' defensive measures except for the second poison pill, the legality of which is now on appeal before the Seventh Circuit.

[2] The Control Share Chapter is part of the revised Indiana Business Corporation Law, Ind. Code §§ 23-1-17-1 to 23-1-54-2 (Burns Cum. Supp. 1986), and is attached in the Appendix along with other pertinent statutory provisions. Indiana corporations were permitted to adopt the Business Corporation Law after April 1, 1986. § 23-1-17-(b)(2). Corporations adopting the Business Corporation Law may exempt themselves from the Control Share Chapter. § 23-1-42-5. CTS was the first Indiana corporation to adopt the Business Corporation Law and in its haste filed two notices with the Indiana Secretary of State. (App. 86-89)

Chapter after DCA announced its tender offer and CTS' refusal to hold a prompt special shareholders meeting on the voting rights issue made it impossible for DCA's tender offer to satisfy the requirements of the Chapter even though it complied fully with the Williams Act. This dilemma left DCA with no alternative but to halt both its tender offer and proxy campaign until April 23, 1986, when the Seventh Circuit affirmed the District Court's declaratory judgment that CTS could not apply the Chapter to DCA in connection with DCA's tender offer. DCA promptly purchased 1,000,000 of the tendered shares.

II. THE CONTROL SHARE CHAPTER IS A POWERFUL PRO-MANAGEMENT WEAPON DESIGNED TO DEFEAT TENDER OFFERS

A. The Operation of the Chapter

Once a corporation has opted into the Control Share Chapter its management automatically strips the voting rights from the shares ("control shares") acquired by a party whose total holding of common stock will exceed certain ownership thresholds beginning as low as 20%. § 23-1-42-1. Voting rights can be reattached to the control shares *only* on the basis of a convoluted process which is completely controlled by management. Management is solely responsible for preparing, presenting to shareholders and taking a position on a voting rights resolution, § 23-1-42-8, and voting rights can be reattached "only to the extent granted by [this] resolution," § 23-1-42-9(a). If the resolution fails, management can redeem the acquiror's shares in a process and at a valuation wholly under its control. § 23-1-42-10(b).

This process presents the acquiror with a Hobson's choice. If the acquiror files an "acquiring person statement," § 23-1-42-6, majorities of at least two different shareholder groups must approve management's voting rights resolution:

(1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group . . .; *and*

(2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

Ind. Code § 23-1-42-9(b) (emphasis added).[3]

Once a party has filed an acquiring person statement, management has fifty days to present its voting rights resolution to the shareholders. § 23-1-42-7(b). Management is not required to hold a special shareholders meeting before the scheduled expiration of a tender offer and the Chapter does not allow a tender offeror to accelerate the meeting. The Chapter only allows the tender offeror to ensure that the special meeting "not be held *sooner* than thirty days" after the acquiring person statement is filed. § 23-1-42-7(d) (emphasis added).

Alternatively, the acquiror may choose not to file an "acquiring person statement," in which case it is faced with the other prong of the Hobson's choice. The acquiror who does not file an acquiring person statement is at the mercy of management, which may redeem its shares "pursuant to procedures adopted by the corporation," § 23-1-42-10(a), and may delay shareholder consideration of a voting rights resolution until the next annual meeting, § 23-1-42-7(c).

The Control Share Chapter comes into play even if the tender offeror, the management of the target company and 90% of the target company's shareholders are nonresidents. § 23-1-

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[3] In control share transactions that implicate §23-1-38-4(a) of the Indiana Business Corporation Law, more than two voting groups must approve the voting rights resolution. *See* §23-1-42-9(b)(1). Appellants' self-serving interpretation of §23-1-42-9(b), CTS Br. at 5 n.3, Indiana Br. at 20 n.*, is contrary to its plain language and the interpretations of the District Court, CTS App. 38-39, the Seventh Circuit, Slip. op. at 20, and other courts that have considered similar requirements, *see Fleet Aerospace Corp. v. Holderman*, No. C-2-86-0556 (S.D. Oh. June 11, 1986), Slip. op. at 12, *aff'd* Fed. Sec. L. Rep. (CCH) ¶92,800 (6th Cir. June 25, 1986) (App. 103); *Icahn v. Blunt*, 612 F. Supp. 1400, 1406-1407 (W.D. Mo. 1985).

42-4(b). The Chapter thus permits the out-of-state management of an Indiana corporation to strip the voting rights from shares tendered by out-of-state shareholders to an out-of-state acquiror in response to a nationwide tender offer that complies with federal law. To the extent the Chapter deters tender offers, it chills a myriad of potential securities transactions with and between nonresidents.

The extraterritorial reach of the Control Share Chapter is especially evident in this case. CTS is an Indiana corporation and DCA is a New York corporation headquartered in Connecticut. Both companies are publicly owned and their stock is traded on the New York Stock Exchange. Approximately two-thirds of the CTS shareholders reside outside of Indiana. Transcript of Proceedings, March 28, 1986, pg. 56. (App. 91)

B. The Chapter Falls Most Heavily on Tender Offers

The market for corporate control allows parties who can make more efficient and profitable use of a company's resources to obtain control over the company.[4] The propensity of management to resist value-maximizing corporate control transactions is well-known. *See generally* Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer,* 94 Harv. L. Rev. 1161 (1981). Tender offers are the most common method used by a party to obtain control of a company whose management has not made efficient use of corporate assets, thereby diminishing shareholder wealth. Tender offers are extended directly to the shareholders, allowing acquirors to sidestep entrenched management and take their case for a change in control directly to the shareholders.

It is evident that the Control Share Chapter was designed to be used against tender offers that are opposed by incumbent

[4] This market is extremely large. In 1985 there were 3,001 corporate control transactions of $500,000 or more. 3 *Corporate Control Alert* 1 (April 1986). (App. 143) The total purchase price of these transactions was $179.6 billion. *Id.* at 9. (App. 144)

management. *First,* by stripping away voting rights, the Chapter falls much more harshly on tender offerors, who always buy shares for their voting rights, than upon other acquirors, who typically buy stock for investment purposes. The value of voting rights to tender offerors is reflected in the high premiums they pay to shareholders.[5] *See generally* Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence,* 11 J. Fin. Econ. 5 (1983) (collecting studies showing that shareholders reap high premiums from changes in corporate control).

Second, by stripping away the voting rights from only the block of shares which puts the holder over an ownership threshold, §§ 23-1-42-2, -9(a), the Control Share Chapter once again most affects tender offerors, who unlike other acquirors invariably purchase substantial blocks of shares.

Third, the delay built into the Chapter is far more prejudicial to tender offerors than to persons who acquire control shares solely for investment purposes. The Chapter allows management to delay a special shareholders meeting on the voting rights issue for fifty days, in practical terms forcing tender offerors to delay completion of tender offers for over three weeks beyond the twenty business day (approximately 28 calendar day) period mandated by regulations under the Williams Act, 17 C.F.R. § 240.14e-1(a). This three week delay gives management ample time to install defensive measures ("poison pills," sale of "crown jewels," "lock-ups," "pac-man" defenses, self-tenders, etc.), to search for a "white knight" acquiror, and to give themselves lucrative severance benefits. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects and Political Competency,* 62 Cornell L. Rev. 213, 238 (1977) (delay is "the most potent weapon in a tender offer fight").

Fourth, the byzantine pro-management provisions of the Control Share Chapter give hostile management an *additional*

[5] "The most important shareholder right is the right to cast votes, equal to the number of shares he holds, for membership in the corporation's board of directors." R. Posner, *Economic Analysis of Law* 302 (2d. ed. 1977).

powerful weapon to oppose tender offers. Management already can oppose a tender offer on the merits, in communications with shareholders required under the Williams Act, 17 C.F.R. § 240. 14d-9(f), and by resorting to an arsenal of potent legal weapons under federal securities laws.[6] In sharp contrast, management has no comparable regulatory scheme to deploy in conjunction with the Chapter against other types of control share transactions.

Fifth, the application of the Control Share Chapter to tender offers has far-reaching effects on all shareholders, each of whom is a tender offeree. In contrast, other control share transactions typically involve only the acquiror and a transferee.

[6] Entrenched management can also utilize the antitrust laws, the common law and other state and federal causes of action as well as implement defensive measures like poison pill shareholder rights plans that may be authorized under state law. The new Indiana Business Corporations Law expressly authorizes the management of Indiana corporations to adopt defensive measures against corporate takeovers without shareholder approval. Ind. Code §23-1-22-4.

ARGUMENT

III. THE CONTROL SHARE CHAPTER IS PREEMPTED BY THE WILLIAMS ACT

The Control Share Act is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Williams Act. *Hines v. Davidowitz,* 312 U.S. 52, 67-68 (1941). The Chapter is also preempted in this case because it was impossible for DCA's tender offer to comply with its provisions even though it satisfied all of the requirements of the Williams Act. *See Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963).

A. The Williams Act Embodies a Policy of Neutrality Between Tender Offerors and Management

This Court has already exhaustively examined the legislative history of the Williams Act and concluded that Congress "expressly embraced a policy of neutrality" between tender offerors and the management of target companies. *MITE,* 457 U.S. at 633. In enacting the Williams Act:

> . . . Congress intended to strike a balance between the investor, management, and the takeover bidder. The bidder was to furnish the investor and the target company with adequate information but there was no intention to do more than give incumbent management an opportunity to express and explain its position. Once that opportunity was extended, Congress anticipated that the investor, if he so chose, and the takeover bidder should be free to move forward within the time frame provided by Congress.

MITE, 457 U.S. at 634 (citation and quotation omitted); *see also Schreiber v. Burlington Northern, Inc.,* 472 U.S. ____, 105 S. Ct. 2458, 2463, 86 L.Ed. 2d. 1, 8 (1985) ("The expressed legislative intent was to preserve a neutral setting in which the contenders could fully present their arguments."); *Great Western United Corp. v. Kidwell,* 577 F.2d 1256, 1276-1281 (5th Cir.

1978), *rev'd on venue grounds sub. nom. Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979).[7]

This policy of neutrality is "a major aspect of the effort to protect the investor," *MITE*, 457 U.S. at 633, and complements the disclosure requirements and other investor protections of the Williams Act. Congress recognized the salutary effects of tender offers and "expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1979).

B. The Chapter Conflicts Directly With the Williams Act

Like the anti-takeover statute struck down in *MITE*, the chief vice of the Control Share Chapter is the delay it injects in the tender offer process. The Chapter allows management to delay a special shareholders meeting on the voting rights issue for fifty days. The Williams Act permits the tender offeror to close a tender offer after twenty business (28 calendar) days. No rational tender offeror, however, will buy shares until the voting rights issue is settled. The Chapter thus prevents tender offerors from completing timely tender offers that satisfy all the requirements of the Williams Act as surely as a flat prohibition against completing tender offers in less than fifty days.

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[7] Contrary to CTS' argument (CTS Br. at 14-16), *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977), where this Court refused to grant tender offerors an implied cause of action under §14(e) of the Williams Act, is fully consistent with this policy of neutrality. This Court correctly recognized that giving tender offerors an implied cause of action under §14(e) would undermine the policy of neutrality by giving tender offerors a new and powerful weapon that would impermissibly tilt the balance in their favor in contests for corporate control. *See also Schreiber v. Burlington Northern, Inc.*, 472 U.S. ____, 105 S. Ct. 2458, 2464, 86 L.Ed.2d. 1, 10 (1985)(limiting scope of §14(e) to avoid "inject[ing] uncertainty in the tender offer process").

A more direct conflict between federal and state regulatory schemes can hardly be imagined, especially since Congress in drafting the Williams Act recognized that delay deters wealth-maximizing tender offers by giving entrenched management more time to implement defensive measures. Congress thus rejected proposed precommencement notification requirements that would have delayed tender offers for *shorter* periods than under the Control Share Chapter. *See MITE,* 457 U.S. at 635-38.

Less dramatically, but just as effectively, the other burdensome and pro-management requirements of the Control Share Chapter also frustrate the investor protection objective of the Williams Act. By subjecting tender offers to the approval of at least two shareholder groups, the Chapter interferes with the individual shareholder's right to make its own decision whether to tender. *See MITE,* 457 U.S. at 639 ("Congress intended for investors to be free to make their own decisions."); *Fleet Aerospace Corp. v. Holderman,* No. C-2-86-0556, slip op. at 22-23 (S.D. Oh. June 11, 1986), *aff.'d* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986). (App. 113-14) The shareholder approval process also superimposes a proxy contest on the tender offer. Management can exploit the proxy rules to delay tender offers beyond fifty days,[8] while the high costs of a proxy contest deter tender offers altogether. *Id.* at 21-22. (App. 112-13)

CTS and Indiana argue implausibly that the Congressionally mandated policy of neutrality places no limits on the power of the states to implement restrictive anti-takeover laws that severely disadvantage tender offerors. Their inverted view of federalism, however, was repudiated by *MITE* and totally ignores the clear conflict between the specific timing require-

[8] If management delays a tender offer for only ten additional days, under the Williams Act shareholders obtain withdrawal rights whose exercise will scuttle a tender offer altogether. *See* 15 U.S.C. § 78d(5).

ments under the Williams Act and the lengthy delay built into the Control Share Chapter.[9]

C. The Control Share Chapter Imposes Conflicting Obligations on DCA and Other Tender Offerors

DCA's tender offer could not comply with the Control Share Chapter even though it satisfied all the Williams Act requirements. Where it is impossible for a party to comply with both state and federal laws, the state law is preempted in favor of the federal requirements. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963).

DCA's tender offer was scheduled to close on April 10, 1986, twenty business days after it was announced. DCA intended to vote the shares it acquired for its slate of director nominees at the Annual Meeting. As both the District Court and Seventh Circuit found, DCA's tender offer complied with all the requirements of the Williams Act.

It was not until *after* DCA announced its tender offer that CTS rushed to embrace the Control Share Chapter. It chose not to hold a special shareholders meeting on the voting rights issue until after both the date DCA's tender offer expired and the Annual Meeting. CTS apparently intended to wait a full fifty days to present its voting rights resolution. Had DCA waited the fifty days, it would have been forced to extend an otherwise lawful and heavily oversubscribed tender offer and been unable to vote any of the tendered shares on behalf of its director slate at the Annual Meeting.

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[9] Section 28(a) of the Securities Exchange Act ("Exchange Act"), 15 U.S.C. § 78bb(a), which simply restates the Supremacy Clause by stating that state laws not in conflict with the Exchange Act are not preempted, is not to the contrary. Section 28 was enacted to preserve state blue sky laws and was passed decades before tender offers became common, the Williams Act had been passed, and states had begun to insulate local companies against takeovers. *See generally Great Western United Corp. v. Kidwell, supra.,* 577 F.2d at 1271, 1275-76.

Indiana's argument that future tender offerors can avoid such problems by substantially lengthening or heavily conditioning their tender offers (Ind. Br. at 40-43) is irrelevant.[10] This appeal concerns only CTS' application of the Control Share Chapter to DCA's tender offer, which made it impossible for the tender offer to comply with the Chapter even though it met all federal requirements.

The Control Share Chapter presents *all* tender offerors with another impossible dilemma. The Williams Act regulations require a tender offeror to make its offer effective within five days of publicly announcing the material terms. 17 C.F.R. § 240.14d-2(b). An acquiring person statement under the Control Share Chapter undoubtedly constitutes a public announcement of a tender offer. *See* 17 C.F.R. § 240.14d-2(b)-(c). On the one hand, the tender offeror can go ahead with a tender offer even though five days is insufficient time to hold a special shareholders meeting on the voting rights issue. A tender offer, however, makes no economic sense if the tendered shares will be stripped of their voting rights. And to protect their own voting rights against dilution, shareholders have every incentive *not* to grant voting rights to the acquiror. On the other hand, the tender offeror can avoid making a tender offer for shares of the Indiana corporation altogether even though a change in corporate control and the installation of new management would be in the best economic interests of both the tender offeror and the shareholders of the target company.

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[10] In describing the convoluted steps tender offerors can take to satisfy both federal and state requirements, Indiana, albeit unwittingly, concedes that the Control Share Chapter has a direct and substantial impact on tender offers and is far from the innocuous regulation of voting rights that it characterizes the Chapter elsewhere in its brief.

IV. THE CONTROL SHARE CHAPTER VIOLATES THE COMMERCE CLAUSE

The Control Share Chapter is per se violative of the Commerce Clause because it is designed to insulate Indiana companies from the market for corporate control, has a discriminatory effect on interstate commerce, and directly regulates economic transactions between out-of-state shareholders and tender offerors. The Chapter also violates the Commerce Clause because its burden on interstate commerce greatly outweighs its putative local benefits.

A. The Chapter is Designed to Discriminate Against Interstate Commerce

State statutes that are designed to isolate local interests from interstate markets are per se violative of the Commerce Clause. *See Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). The Control Share Chapter is silent as to its purposes but this Court need not speculate about those purposes. Counsel of record for CTS has flatly stated that the Chapter is *intended* to insulate Indiana corporations from the interstate market for corporate control by deterring nonresidents from acquiring control of Indiana corporations:

> When asked why Indiana had decided to adopt such a virulent statute [the Control Share Chapter], James Strain, an Indianapolis corporate lawyer from Barnes and Thornburg says, "We don't like having all our companies taken over by East Coast firms." On further reflection, Strain says Midwestern and West Coast acquirors are no better.

3 *Corporate Control Alert* 1, 10 (March 1986). (App. 141) Appellants have adduced no evidence to the contrary. In fact, Indiana concedes that the Chapter is a "regulation of [corporate] takeovers." (Ind. Br. at 28)

The circumstances of Indiana's adoption of the Control Share Chapter highlight its illegitimacy. The Chapter was

passed in response to bids by nonresidents for two large Indiana corporations. 3 *Corporate Control Alert* 1, 10-11 (March 1986) (App. 141-42). The Chapter also comes in the context of a determined effort by some states to circumvent *MITE* with a new wave of anti-takeover legislation. *See generally* Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 Sec. Reg. L. J. 332 (1986). (App. 145) The most common "second generation" anti-takeover legislation has been control share acquisition statutes similar to Indiana's in both operation and effect. *Id.* Such statutes have been stricken by every court to have considered their constitutionality. *See Fleet Aerospace Corp. v. Holderman,* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986) (Ohio statute); *Terry v. Yamashita,* Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. June 13, 1986) (Hawaii statute); *APL Limited Partnership v. Van Dusen Air, Inc.,* 622 F. Supp. 1216 (D. Minn. 1985), *vacated on other grounds and appeal dismissed,* Nos. 85-5285/5286-MN (8th Cir. November 26, 1985) (Minnesota statute); *Icahn v. Blunt,* 612 F. Supp. 1400 (W.D. Mo. 1985)(Missouri statute).

B. The Chapter Has A Discriminatory Effect On Interstate Commerce

A state statute is per se violative of the Commerce Clause if it has a discriminatory effect on interstate commerce. *See Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984). This Court has repeatedly emphasized that in Commerce Clause cases "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 37 (1980).

Appellants would have this Court consider the Control Share Chapter in a vacuum, ignoring its practical effect of discrimination against interstate commerce. Because of the distribution of financial resources in this country the large

majority of tender offers for Indiana corporations will come from out-of-state bidders and will be addressed to a sizeable majority of out-of-state shareholders. Thus, by placing a major obstacle in the way of tender offers, the Chapter inevitably disrupts the flow of interstate commerce in the market for corporate control and disproportionately burdens out-of-state acquirors and shareholders with the cost of protecting Indiana companies from takeovers.

The facial neutrality of the Control Share Chapter is thus irrelevant. This case is no different from numerous decisions of this Court under the Commerce Clause striking down facially neutral regulations as disproportionally affecting out-of-state parties and impeding the flow of interstate commerce. *See, e.g., Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945) (facially neutral regulation of train lengths).

States may not prevent out-of-state parties from gaining access to and placing in interstate commerce the resources of that state. *See, e.g., Hughes v. Oklahoma,* 441 U.S. 322 (1979) (prohibition on shipment of minnows outside state); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923) (requirement that local natural gas producers supply all in-state needs before servicing out-of-state customers). The Control Share Chapter attempts to prevent the shift of corporate control, assets and operations from Indiana to other states. For purposes of Commerce Clause analysis, it is no different from the statute in *Hughes* that prohibited the shipment of Oklahoma's minnows to other states.

The Chapter also gives the incumbent management of Indiana businesses a privileged position in the interstate market for corporate control, thereby having a discriminatory effect on interstate commerce. *Cf. Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. ____, 106 S. Ct. 2080, 2085, 90 L.Ed 2d 552, 560 (1986) ("Economic protectionism . . . may include attempts to give local consumers an advantage over consumers in other States.") Management is free to

acquire out-of-state corporations and shift their assets and operations to Indiana. Nothing in Indiana law prevents the management of Indiana corporations from voluntarily transferring corporate control, assets and operations to other states. Yet, the Chapter allows management to strip acquirors—a large majority of whom will be from out-of-state—of the competitive advantages they may have earned for themselves in the market for corporate control by blocking them from using a tender offer which fully complies with federal law to acquire control over Indiana corporations. *See Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 351 (1977). This lack of reciprocity in the Chapter portends a wave of protectionist legislation that is inconsistent with the Commerce Clause as each state attempts to restrict out-of-state acquirors from obtaining control of resident corporations while giving resident corporations free rein to obtain control of out-of-state corporations. *See generally H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538-39 (1949).

Finally, the Control Share Chapter is unconstitutional because it forces economic operations to be performed within Indiana, even though these same operations might be performed more efficiently elsewhere if Indiana had not chilled the market for corporate control by harshly restricting tender offers. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (striking down statute requiring cantaloupes to be packed in state; announcing rule of per se invalidity); *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down statute requiring in-state processing of shrimp); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928)(same).

C. The Chapter is a Direct Regulation of Interstate Commerce

The Control Share Chapter is also per se violative of the Commerce Clause because it directly regulates the transactions of out-of-state residents in interstate commerce. Last term, this

Court in *Brown-Forman Distillers, supra,* struck down as a direct regulation of interstate commerce a statute that forced liquor distillers to conform the prices they charged in other states to their in-state prices and expressly relied upon *MITE's* discussion of the per se invalidity of direct regulations of interstate commerce, 457 U.S. at 641-643.

Like the Illinois Business Takeover Act struck down in *MITE,* the Control Share Chapter directly regulates extensive out-of-state transactions between tender offerors and shareholders by forcing the tender offeror to meet a battery of state-imposed requirements before going ahead with its tender offer. Direct regulation of nonresidents is inevitable because the Chapter applies even if the tender offeror, 90% of the target company's shareholders, and the management of the target corporation are located outside Indiana.

CTS and Indiana would have this Court believe that in adopting the Control Share Chapter, Indiana has washed its hands of any regulatory activities having extraterritorial effects. In reality Indiana has simply deputized those most likely to exploit the protectionist provisions of the Chapter: the incumbent management of Indiana corporations. Indiana's efforts are unavailing. A state may not regulate by indirection commerce within other states. *See Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511, 524 (1935).

D. The Chapter's Burden on Interstate Commerce Far Outweighs its Local Benefits

Even if the Control Share Chapter is not unlawful per se, it violates the Commerce Clause because the burdens it imposes on interstate commerce far exceed the putative local benefits. *See Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). Summary affirmance is warranted because this case is *MITE* revisited.

1. The Burdens on Interstate Commerce are Great

What Indiana has done with the Control Share Chapter is to "slow or freeze the flow of commerce for protectionist reasons . . . [and] . . . isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey,* 437 U.S. 617, 628 (1978); *see also Dean Milk Co. v. City of Madison,* 340 U.S. 349, 354 (1951)(state may not erect economic barrier to protect local industry). Indiana has burdened the interstate market for corporate control by hindering the operation of a key component of that market—the tender offer mechanism.

The impact of the Control Share Chapter on interstate commerce is indistinguishable from the impact of the Illinois Business Takeover Act struck down in *MITE.* Like the Illinois statute, the Chapter imposes an additional layer of burdensome requirements on the extensive federal regulation of tender offers. These requirements embody a strong pro-management bias and would deter numerous tender offer transactions in interstate commerce between nonresident parties.

This Court has already recognized the harm to shareholders and society when a State burdens the market for corporate control by discouraging tender offers:

> The effects of allowing [a State] to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.

MITE, 457 U.S. at 643.

2. The Purported Benefits of the Chapter Are Illusory

Both Indiana and CTS disingenuously suggest that the Control Share Chapter is directed at protecting shareholders

and the public, ignoring that § 23-1-42-5 gives *management* the sole discretion to adopt and administer the Chapter. It is pure sophistry to suggest that in invoking and administering the Chapter the management of Indiana corporations will have special solicitude for Indiana shareholders and residents.

Management and shareholders have divergent interests in the takeover context. *See, e.g., Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 954-55 (Del. 1985) (noting the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders" in considering a tender offer). CTS management's single-minded opposition to DCA's tender offer and proxy solicitation and its rush to embrace the Control Share Chapter graphically illustrate this conflict. The Seventh Circuit observed that as a result of the defensive measures deployed by the CTS management, "[t]o buy CTS, you must buy out its management." Slip op. at 16.

Ironically, the claim that the Control Share Chapter protects shareholders by requiring shareholder voting illustrates this point. The Chapter allows *management* to adopt the Control Share Chapter *without shareholder approval,* thus giving management the nearly absolute discretion to sacrifice the well-recognized benefits of tender offers to shareholders in order to preserve its control over the corporation.

In *MITE,* this Court noted that such incongruities are "at variance with [the State's] asserted legislative purpose, and tends to undermine appellants' justification for the burdens the statute imposes on interstate commerce." *MITE,* 457 U.S. at 644. There, the statute exempted from its coverage defensive self tenders orchestrated by management. Here, management has absolute discretion in employing the Chapter. *See also Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 446-47 (1978) (noting that exceptions favoring local interests undermine presumption in favor of statutory validity). Benefits

to shareholders and third parties—if present at all—are only provide incidentally by the Chapter.

Even if the interests which appellants suggest that the Control Share Chapter is designed to serve are taken at face value, they are not significantly or evenhandedly advanced by the Chapter. This Court observed in *Lewis v. BT Investment Managers, Inc.* that:

> In almost any Commerce Clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

447 U.S. at 43-44.[11]

a. Protection of Shareholders

Appellants argue that the chapter protects small shareholders who choose not to tender their shares and are faced with the prospect of co-existing with a large shareholder. This argument ignores reality. The available evidence indicates that small shareholders benefit from the presence of a large shareholder, as, for example, by the aggressive monitoring of management by the large shareholder, whose sizeable investment is a powerful incentive to zealous oversight. *See* Easterbrook & Fischel, *Voting in Corporate Law,* 26 J. Law. & Econ. 395 (1983). Small shareholders also share in the premiums that result from the facilitation of corporate control

[11] *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978), upon which appellants rely, is clearly distinguishable because there the statute did not restrict the flow of interstate commerce or insulate local companies from the operation of an interstate market. In contrast, the Control Share Chapter chills interstate commerce by deterring tender offers to protect local companies from the interstate market for corporate control.

transaction by the large shareholder, *see* Schleifer & Vishny, *Large Shareholders and Corporate Control,* 94 J. Pol. Econ. 461 (1986), and the value of their stock actually rises on the average after a control transaction that results in the creation of a large shareholder, *see* Bradley & Rosenzweig, *Defensive Stock Repurchases,* 99 Harv. L. Rev. 1378, 1410 (1986). The Chapter thus rests upon an unsupported fear of large shareholders. By deterring tender offers altogether, the Chapter in any event is an unreasonably heavy-handed way of protecting minority shareholders from the speculative fear of oppressive conduct by an occasional large shareholder.

In addition, the shareholder protection provisions of the Control Share Chapter duplicate those of the Williams Act. The Williams Act ensures that shareholders have all relevant information before "voting" for the tender offer (and offeror) by tendering their shares. If the tender offeror fails to provide a premium sufficient to compensate shareholders for the risks that accompany a change of control, not enough shareholders will tender their shares and the tender offer will be "voted" down.[12] The Chapter distorts shareholder choice by giving management—who would otherwise have no direct role in the tender offer—the opportunity to wield its considerable influence with shareholders in a last ditch effort to scuttle the tender offer.

Finally, Indiana has other statutes which are much more closely tailored to protect minority shareholders and which are uniformly applicable to Indiana corporations. The Business Combinations Chapter, Ind. Code § 23-1-43, for example, specifically protects minority shareholders against squeeze-out mergers. Minority shareholders are vested with dissenter's rights. Ind. Code § 23-1-44. They are further protected by the fiduciary obligations to minority shareholders that Indiana law

[12] Federal proxy regulations further protect shareholders in cases like this where the tender offeror combines a proxy solicitation campaign and a tender offer.

imposes on any party who acquires control of an Indiana corporation.

b. Shareholder Ratification of a Fundamental Corporate Change

Alternatively, CTS and Indiana argue that the Control Share Chapter is an innocuous regulation of the internal affairs of Indiana corporations that gives shareholders the right to ratify a change in the pattern of ownership of the corporation's common stock by approving or disapproving a tender offer before it is consummated. They incorrectly analogize the Control Share Chapter to provisions requiring shareholder approval of mergers, sale of corporate assets, corporate dissolutions and other fundamental changes in the *structure* of the corporation.

As this Court recognized in *MITE,* tender offers do not implicate the internal affairs of the corporation. 457 U.S. at 645-46. Tender offers are transactions in interstate commerce solely between the tender offeror and shareholders. The only issue is who will supervise the assets and operations of an otherwise unchanged corporation. In contrast, mergers, sales of assets, dissolution of the corporation and creation of new classes of stock affect the internal structure of the corporation and shareholder approval provides a crucial review of management's actions in arranging these transactions.

Moreover, the complicated voting provisions of the Control Share Chapter are democratic in appearance only. Section 23-1-42-9(b)(2) of the Chapter permits even a small minority comprised of so-called disinterested shareholders to thwart the will of the majority of all shareholders with respect to a control share transaction. In contrast, all other corporate decisions which must be ratified by shareholders under Indiana law must be approved by a simple majority of *all* shareholders, be they interested, disinterested or simply uninterested.

Dire warnings to the contrary, there is no danger that by affirming the Seventh Circuit this Court will be federalizing state corporate law. By their nature, tender offers involve

extensive interstate commerce more certainly than other corporate activities regulated by the state. Moreover, because tender offers are a relatively recent phenomena, state regulation of tender offers is neither as developed nor as engrained as other areas of state corporate law. In fact, the Williams Act was prompted largely because the paucity of state tender offer regulation left investors unprotected and because of the need for uniform regulation of tender offers in the national market for corporate control.

The Seventh Circuit properly focused on the practical impact of the Control Share Chapter on interstate commerce and its decision stands for the unremarkable proposition that state laws that unduly burden interstate commerce are unconstitutional. Because of the limited and fact-intensive nature of its analysis, the Seventh Circuit's decision does not restrict in any way Indiana's authority to regulate its corporations in ways that do not unduly burden interstate commerce.

c. Protection of Indiana Companies and Residents

The Chapter is an ineffective means of protecting either Indiana companies or citizens. If the Chapter attempts to slow the pace of takeovers by resorting to economic protectionism, it is unlawful. Even if the Chapter is not per se unconstitutional, there is no reason to believe that shareholders of Indiana corporations—most of whom can be from out-of-state—will oppose value-maximizing changes in corporate control in order to keep corporate assets and operations in Indiana. Nor is there any evidence that successful tender offerors are more likely than existing management to shift the assets and operations of Indiana corporations to other states. It is significant that the Chapter neither establishes criteria that take into account the interests of Indiana citizens nor places any limits on the out-of-state transfer of assets and operations by Indiana corporations.

V. PLENARY CONSIDERATION IS UNNECESSARY

Plenary consideration of the Seventh Circuit's decision is unnecessary. The District Court did not invalidate the Chapter

altogether but only prohibited CTS from applying the Chapter against DCA's tender offer. There is also no need to re-examine *MITE*. That decision has been consistently applied by other lower courts and is dispositive here without extension or reinterpretation.

A. The District Court's Decision Was Limited to the Particular Facts of This Case

The unique facts giving rise to this case make it an inappropriate vehicle for a sweeping review by this Court of the constitutionality of the Control Share Chapter or control share acquisition statutes generally. The timing of CTS' adoption of the Chapter and its unwillingness to hold a special shareholders meeting before the Annual Meeting created a direct conflict between the Chapter and the Williams Act and a pressing threat of irreparable harm that may be absent in other cases. Neither the District Court nor the Seventh Circuit ruled out the possibility that the Chapter could constitutionally be applied by Indiana corporations that are significantly more local in nature than CTS. Indeed, the District Court's ruling was limited to a holding that the Chapter "may not constitutionally be applied *to prevent DCA* from voting any shares acquired through its tender offer at the April 25, 1986 metting." (CTS App. at 87) (emphasis added)

B. *MITE* Is Dispositive and Has Provided Clear Guidance to the Lower Courts

MITE is controlling, and provides two solid grounds for summary affirmance: (1) the direct conflict between the timing requirements of the Control Share Chapter and the Williams Act; and (2) the burden imposed by the Chapter on interstate commerce far outweighs benefits identified *post hoc* by opposing counsel. If anything, the Chapter is more objectionable than the anti-takeover statute struck down in *MITE* because it is administered by management, which is naturally more resistant to tender offers than presumptively neutral state officials.

There is no merit to CTS' claim that plenary consideration is necessary because the lower courts are divided or confused in their application of *MITE.* (CTS Br. at 9-10) The lower courts have consistently followed *MITE* in their treatment of state regulations of corporate takeovers.

Since *MITE,* lower courts have uniformly struck down statutes that were akin to the Illinois Business Takeover Act. *See, e.g., Mesa Petroleum Co. v. Cities Service Co.,* 715 F.2d 1425 (10th Cir. 1983); *Telvest v. Bradshaw,* 697 F.2d 576 (4th Cir. 1983); *Martin-Marietta Corp. v. Bendix Corp.,* 690 F.2d 558 (6th Cir. 1982); *National City Lines, Inc. v. LLC Corp.,* 687 F.2d 1122 (8th Cir. 1982). They have also uniformly struck down control share acquisition acts, correctly recognizing that such statutes are thinly veiled evasions of *MITE. See, e.g., Fleet Aerospace Corp. v. Holderman,* Fed. Sec. L. Rep. (CCH) ¶ 92,800 (6th Cir. June 25, 1986); *Terry v. Yamashita,* Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. June 13, 1986); *APL Limited Partnership v. Van Dusen Air, Inc.,* 622 F.Supp. 1216 (D. Minn. 1985), *vacated on other ground, and appeal dismissed* Nos. 85-5285/5286 MN (8th Cir. November 26, 1985); *Icahn v. Blunt,* 612 F.Supp. 1400 (W.D. Mo. 1985).

The lower courts have been guided by two principles. First, state regulations that require an extension of tender offers beyond the twenty business day period mandated by the Williams Act create an impermissible delay that runs afoul of the Supremacy Clause. Second, state regulations that interfere with significant numbers of interstate transactions between tender offerors and nonresident shareholders directly regulate interstate commerce, smack of economic protectionism, are not offset by legitimate local benefits and are barred by the Commerce Clause. These principles provide clear standards for both courts and state legislators.

The lower courts *have* upheld state legislation that is not designed to thwart tender offers and chill the market for corporate control but to advance legitimate state interests, as

suggested by Justices Powell and Stevens in their concurrences in *MITE*. *See, e.g., L.P. Acquisition Co. v. Tyson,* 772 F.2d 201 (6th Cir. 1985) (upholding state regulation of a tender offer that was not subject to the requirements of the Williams Act); *Cardiff Acquisitions, Inc. v. Hatch,* 751 F.2d 906 (8th Cir. 1984) (upholding portions of the Minnesota Takeover Act because they did not unduly burden tender offerors, cause delay, or allow enforcement beyond state borders).

Given the balanced approach to state tender offer regulation taken by the lower courts, the fact-intensive nature of each case that implicates state regulations and the highly unusual circumstances of the case giving rise to this appeal, plenary review is neither necessary nor desirable.

C. DCA Is Severely Prejudiced By Further Delay

Plenary consideration could deprive DCA of its rights as CTS' largest shareholder over the next crucial months. DCA's goal from the outset has been to elect its slate of directors and oust the inefficient present management of CTS.[13] But as a practical matter, DCA cannot call a special shareholders meeting to elect a new slate of CTS directors if during the pendency of this appeal it is restrained or deterred from voting any of the shares it acquired in its tender offer and in any subsequent control share acquisition. If this Court orders plenary consideration, the pendency of the appeal could prevent DCA from voting its shares at the next CTS Annual Meeting in April, 1987, when all of CTS' directors are up for election, or at an earlier shareholders meeting that DCA has the right under Indiana law to call at any time, Ind. Code § 23-1-29-2(a)(2).

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[13] The Seventh Circuit noted that "CTS has been a troubled firm of late," slip op. at 6, pointing to its declining rate of return, attributable in part to a "series of acquisitions to which [DCA] objected and which indeed turned out to be flops," *id.* at 12. It is noteworthy that the price of CTS stock has plummeted from 44¾ to 29⅛ (8/21/86) in recent weeks.

CONCLUSION

The unanimous decision of the Seventh Circuit should be summarily affirmed.

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Respectfully submitted,

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